



# SENATE BILL 781: Regulatory Reform Act of 2011

2011-2012 General Assembly

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<b>Committee:</b>		<b>Date:</b>	June 28, 2011
<b>Introduced by:</b>	Sens. Rouzer, Brown	<b>Prepared by:</b>	Karen Cochrane-Brown
<b>Analysis of:</b>	Ratified		Committee Counsel

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**SUMMARY:** *Senate Bill 781 is a recommendation of the Joint Legislative Regulatory Reform Committee. The bill makes numerous changes to the Administrative Procedure Act (APA) relating to the rulemaking process, the contested case process, and judicial review of agency decisions. The bill also makes a number of other changes to the laws relating to certain environmental policies.*

## ***Part I: Rulemaking.***

Section 1. This section amends the law related to the scope and effect of rules to add a requirement that an agency shall not seek to enforce a policy, guideline, or other nonbinding interpretive statement that fits the definition of a rule under the APA, if it has not been adopted as a rule in accordance with the APA.

## Section 2.

This section adds 3 new sections to Article 2A of Chapter 150B.

The first new section, G.S. 150B-19.1, is a set of regulatory principles that agencies must follow when developing and adopting proposed rules. The principles include:

- An agency may only adopt rules that are clearly authorized by federal or State law and that are necessary to serve the public interest.
- An agency shall seek to reduce the burden upon those who must comply with the rule.
- Rules must be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- An agency must consider the cumulative effect of rules and shall not adopt a rule that is unnecessary or redundant.
- Rules should be based on sound scientific, technical, economic or other relevant information.
- Rules must be designed to achieve the regulatory objective in a cost-effective and timely manner.

Each year, agencies must conduct a review of existing rules and repeal any rules which it finds to be unnecessary, unduly burdensome, or inconsistent with the principles.

Agencies must post information about a proposed rule on its website when it submits the rule for publication in the NC Register.

Agencies must determine whether there is overlap in its policies and programs with another agency and coordinate their rulemaking activity.

Agencies must review details of fiscal note with the rulemaking body.

Agencies must consider at least 2 alternatives to the proposed rule if the rule has a substantial economic impact.

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Agencies must prepare federal certification if the rule is required by federal law and post the certification on the website.

The second new section, G.S. 150B-19.2, codifies the Rules Modification and Improvement Program from the Governor's Executive Order 70. This requires OSBM to coordinate and oversee an annual review of existing rules. The program directs OSBM to create a web portal dedicated to receiving public comments on rules and tracking agency progress on reforming rules.

The third new section, G.S. 150B-19.3, prohibits certain enumerated agencies authorized to implement and enforce environmental laws from adopting rules for the protection of the environment or natural resources that impose standards and limitations that are more restrictive than those imposed by an analogous federal law or rule, unless the rule responds to an emergency, a specific law, a change in budgetary policy, or a court order.

Section 3. Repeals a provision relating to federal certification that was moved to a new section.

Section 4. Clarifies a provision relating to temporary rulemaking.

Section 5. Makes conforming changes to the procedure for adopting a permanent rule and clarifies that fiscal notes are subject to public comment. The section also requires that agencies review any fiscal notes and the public comments related to them before adoption of a proposed rule.

Section 6. Amends the fiscal note section to (1) require OSBM to enforce the regulatory principles; (2) make failure to prepare a substantial economic impact fiscal note a basis to disapprove a rule; (3) define the steps in preparing a substantial economic impact fiscal note; and (4) add a requirement that the fiscal note identify the 2 alternative to the rule that were considered by the agency. This section also reduces the threshold for a substantial economic impact from \$3,000,000 to \$500,000.

Sections 7, 8 and 9. Remove obsolete references to reports to the Joint Legislative Administrative Procedure Oversight Committee.

Section 10. Deletes unused and obsolete references.

Section 11. Removes obsolete reference to a "loose leaf" format previously used for the Administrative Code.

Section 12. Clarifies that agencies which are exempt from rulemaking under the APA must submit rules for inclusion in the Code.

Section 13. Deletes an unused and obsolete provision relating to a manual for notice of rulemaking proceeding and notice of text.

Section 14. Conforms reference to review by OSBM of rules that affect local government expenditures.

## ***Part II: Contested Cases.***

Sections 15 through 27 amend Articles 3 and 4 of the APA to eliminate the requirement that an ALJ's decision be returned to the agency for a final decision. The bill makes the ALJ's decision the final administrative decision in the contested case. The bill also amends the law to provide that certificate of need cases and local government personnel cases will be handled in the same manner as all other cases decided under Article 3.

Inasmuch as the bill eliminates the possibility of an agency reversal of an ALJ decision, the standard for judicial review is also modified. The bill provides that in reviewing a final decision where the asserted error is based on a constitutional violation, actions in excess of statutory authority or jurisdiction, or

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unlawful procedure, the court shall use the de novo standard of review. In reviewing cases where the error asserted is that the decision was unsupported by substantial evidence or was arbitrary and capricious, the court will determine whether the decision is supported by substantial evidence in view of the whole record.

Sections 28 through 55 of the bill contain conforming amendments to various provisions in the General Statutes that refer to final agency decisions.

Section 55.1 adds a new section directing DHHS to seek a waiver from the federal government for final decisions in Medicaid cases made by OAH.

Section 55.2 directs OAH and DENR to seek approval from EPA for allowing OAH to make final decisions in cases involving federal environmental law.

## ***Part III: Miscellaneous Issues.***

Section 56. Amends the provision of the APA which directs an agency to issue a declaratory ruling upon the request of an aggrieved person. The amendment authorizes the agency to issue a declaratory ruling to resolve a conflict or inconsistency within the agency. The section also establishes a process to be used by an agency in response to a request for a declaratory ruling. The new process gives the agency 30 days to decide to grant or deny a request for a ruling. If granted, the agency has an additional 45 days to issue the ruling. Failure to issue the ruling within 45 days is deemed a denial on the merits. Upon judicial review of such a denial, the court cannot consider any basis for denial that was not offered to the petitioner in writing.

Section 57. Directs every state agency with rulemaking power to compile a list of all of the agency's rules that fit the following criteria:

- Rules that are mandated by federal law or regulation.
- If not mandated by federal law or regulation, rules that have a federal regulation that is analogous.
- If there is an analogous law or regulation, whether the rule is more stringent than the federal law or regulation.

The list must be delivered to the Joint Regulatory Reform Committee by October 1, 2011.

Section 58. Directs the Joint Regulatory Reform Committee to study the requirements for administrative hearings conducted under Article 3A of the APA. The agencies subject to Article 3A are occupational licensing agencies, the State Banking Commission and the Commissioner of Banks, the Credit Union Division, the Department of Insurance, the State Chief Information Officer in certain cases, the State Building Code Council, and the State Board of Elections in cases involving regulation of campaign contributions and expenditures. The Committee must report to the 2012 Session of the 2011 General Assembly.

Section 59. Provides that major developments subject to permitting under the Coastal Area Management Act are exempt from the Environmental Policy Act.

Section 60. Provides that certain environmental regulatory permits issued on or after July 1, 2011 shall be valid for up to 8 years. Currently, most permits expire after five years or less.

Section 61. Directs the Secretary of the Department of Environment and Natural Resources to develop uniform policy for notification of deficiencies and violations with differing notifications based on the

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level of potential harm. The Secretary is directed to report to the Legislative Environmental Review Commission by October 1, 2011, and to implement the plan by February 1, 2012.

Section 61.1 Directs the Office of Administrative Hearings to evaluate the use of mediated settlement conferences, develop a plan to expand the use of such conferences, and report to Joint Regulatory Reform committee by February 1, 2012.

Section 61.2 Repeals SB 22 which was enacted earlier this session.

Section 61.3 Amends the Umstead Act to authorize a person injured by the act to sue for injunctive relief in Wake County Superior Court and directs the court to determine whether the act was violated and if so, enter a judgment to remove the effects of the violation. The court is also authorized to void any contract entered in violation of the act.

Section 61.4 Provides that if the 2011 Appropriations Act becomes law, then Section 13.11B of that act would be repealed by this act. Section 13.11B includes three new statutes affecting rules adopted by the Department of Labor, the Agriculture Department, and the Department of Environment and Natural Resources. The section prohibits the adoption of rules that are more stringent than federal analogs. The section would conflict with Section 2 of this bill.

Section 62. Severability clause.

**EFFECTIVE DATE:** Sections 2 through 15 of the act become effective October 1, 2011, and apply to rules adopted on or after that date. Sections 15 through 55 become effective January 1, 2012, and apply to contested cases commenced on or after that date. Unless otherwise provided, the remainder of the act becomes effective when it becomes law.

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